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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1949.

No. 311.

VINCENT ANTHONY SORRENTINO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING.

Your petitioner, Vincent Anthony Sorrentino, respectfully represents that:

1. On September 3, 1949, his petition for certiorari to the Court of Appeals for the Third Circuit, which affirmed his conviction for violation of the Mann Act (36 Stat. 825, 18 U. S. C. A. §§ 398 and 399) and conspiracy to violate it (35 Stat. 1096, 18 U. S. C. A. § 88) was filed. On November 7, 1949, certiorari was denied by this Honorable Court.

2. Petitioner and one Elizabeth A. Kobli were tried simultaneously and both were convicted. Petitioner's conviction on the substantive charge rests entirely on his guilt of the conspiracy charge.

3. Kobli's conviction on both the substantive and conspiracy charges was reversed by the Court of Appeals on the ground that the guilty verdict resulted from a proceeding which was not a "public trial" within the requirement of the Sixth Amendment to the United States Constitution. See *Kobli v. U. S.*, 172 F. 2d 919 (C. A. 3). Following the reversal of her conviction Kobli pleaded guilty and was given a suspended sentence.

4. The Court of Appeals in reviewing petitioner's conviction held that the proceedings did not constitute a "pub-

lic trial'" within the requirement of the Sixth Amendment to the United States Constitution but held that petitioner could not raise that question in the Court of Appeals because of the action of his trial counsel in failing to object to the ruling of the court excluding certain persons from the court room, which ruling resulted in the proceeding being other than a "public trial" within the meaning of the Sixth Amendment to the United States Constitution.

5. In the petition for certiorari, petitioner contended that the requirement of a public trial as applied to federal criminal proceedings is one which can not be waived and that in the alternative if this Honorable Court concluded that such requirement was capable of waiver, petitioner had not in fact waived his right to a public trial.

6. Since filing the petition for certiorari, petitioner's counsel has reread the recent decision of this Honorable Court in *Terminiello v. Chicago,* 93 L. ed. 865 and respectfully submits that the principle followed in that case by the majority of this Honorable Court is applicable to the petitioner's case and that under it, it cannot be held that petitioner waived his right to a public trial. As stated by Mr. Chief Justice Vinson in *Terminiello v. Chicago,* 93 L. ed. at p. 869:

> ". . . The Court today reverses the Supreme Court of Illinois because it discovers in the record one sentence in the trial court's instructions which permitted the jury to convict on an unconstitutional basis. The offending sentence had heretofore gone completely undetected. It apparently was not even noticed, much less excepted to, by the petitioner's counsel at the trial. No objection was made to it in the two Illinois appellate tribunals which reviewed the case. Nor was it mentioned in the petition for certiorari or the briefs in this Court."

Mr. Justice Frankfurter stated in *Terminiello v. Chicago,* 93 L. ed. at p. 870:

> "The impropriety of that part of the charge which is now made the basis of reversal was not raised at the trial nor before the Appellate Court of Illinois. The fact that counsel for Terminiello wholly ignored it is emphasized by the objections that he did make in relation to other instructions given and not given. On appeal to the Supreme Court of Illinois, counsel still failed to claim as error that which this Court on its own motion now finds violative of the Constitution. It was not mentioned by the Illinois Supreme Court in its careful opinion disposing of other claims and it was not included in the elaborate petition for rehearing in that court. Thus an objection, not raised by counsel in the Illinois courts, not made the basis of the petition for certiorari here—not included in the 'questions presented,' nor in the 'reasons relied on for the allowance of the writ'—and explicitly disavowed at the bar of this Court, is used to upset a conviction which has been sustained by three courts of Illinois."

It is clear, therefore, that particularly where a constitutional right is involved, the fact that no objection was made in the trial court is not fatal to a petitioner's contention in this Honorable Court. This would seem to be even more clearly the law where the proceedings are, as in petitioner's case, held in the federal courts. For as this Court has long held, proceedings in the federal courts are subject to the close scrutiny and supervisory review of this Honorable Court. See *McNabb v. U. S.*, 318 U. S. 332. And in this case, petitioner definitely raised the constitutional point in the Court of Appeals and in the petition for writ of certiorari.

7. But quite apart from the constitutional point (the only one raised in the petition for writ of certiorari), petitioner's conviction should be reversed because of the trial judge's failure to instruct the jury properly in accordance with the principles heretofore enunciated by this Honorable Court with respect to hearsay declarations of the al-

leged co-conspirators which were the basis of petitioner's conviction. Over petitioner's objections, numerous declarations made by alleged co-conspirators outside of his presence were admitted on the theory of conspiracy. However, the learned trial judge failed to instruct the jury that before such declarations could be considered by the jury in convicting petitioner, the must must *first* find beyond a reasonable doubt from *other* evidence that (a) there was in existence and in operation the charged conspiracy and (b) that petitioner was a participant in a conspiracy. Otherwise, as stated in *Glasser v. U. S.*, 315 U. S. 60, 75:

> "Hearsay would lift itself by its own bootstraps to the level of competent evidence."

The learned Court instructed the jury as follows (482):[1]

> "Now a conspiracy having been established by the Government, if it was, by *evidence,* the acts and declarations of each conspirator in the course of the conspiracy, and in furtherance of the common object, even though in the absence of the other conspirators, are in contemplation of the law the acts and declarations of them all and may, therefore, be considered by you in determining the guilt of the particular defendants." (Emphasis added.)

This instruction was erroneous for several reasons. It not only failed to instruct the jury as to the condition precedent to the use of the challenged declarations, it also mis-stated the law. When the jury were told that "now a conspiracy having been established by the Government, if it was, by evidence . . .", there was no limitation on the word "evidence" to *exclude the challenged declarations themselves* in the process of concluding whether the charged conspiracy existed and whether petitioner was a participant in it. Finally, it does not require, as it should, that

1. This reference is to page 482 of the original transcript of testimony on file in this Honorable Court.

the jury *first* find beyond a reasonable doubt that the charged conspiracy existed and that petitioner participated in it but merely suggests the necessity that a conspiracy be "established" (i. e., that some prosecution evidence be offered in support of the charge of conspiracy).

As stated by Mr. Justice Frankfurter, dissenting in *Nye & Nissen v. U. S.*, 93 L. ed. 752, 758:

> "Only when the jury has been properly instructed as to the relevant standards to be applied to the evidence does a basis exist for determining whether evidence sufficient to support the verdict was presented to it. See Bohlenbach v. United States, 326 U. S. 607, 613-615."

Since the jury had not been so properly instructed, it is clear that petitioner's conviction should be reversed.

Wherefore, your petitioner respectfully prays that rehearing be granted, that the order filed November 7, 1949 denying certiorari be vacated, and that certiorari be granted.

And your petitioner will ever pray, etc.

Respectfully submitted,

VINCENT ANTHONY SORRENTINO,
Petitioner.

By: DAVID BERGER,
THOMAS D. MCBRIDE,
Counsel for Petitioner.

We hereby certify that this Petition is presented in good faith and not for delay and that it is restricted to substantial grounds available to petitioner although not previously presented.

DAVID BERGER,
THOMAS D. MCBRIDE,
Counsel for Petitioner, Vincent Anthony Sorrentino.